78-457

IN THE

Supreme Court Of The United States

Jerald V. Nietert, Doris A. Nietert, Husband and Wife; C. L. Goodwin and Alice Goodwin, Husband and Wife ..... *Appellants*

V.

Citizens Bank & Trust Co. ..... *Appellee*

PETITION FOR WRIT OF CERTIORARI
FROM
SUPREME COURT OF THE
STATE OF ARKANSAS

HERSCHEL W. CLEVELAND

HIXSON AND CLEVELAND
Attorneys at Law
P. O. Drawer 607
Paris, Arkansas 72855

Attorneys for Petitioners

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Comes now the Appellants, Jerald V. Nietert, Doris A. Nietert, Husband and Wife, C. L. Goodwin and Alice Goodwin, Husband and Wife, and for their Petition For Writ of Certiorari, do state:

1. The Opinion from the Supreme Court of Arkansas, Division 1, was reported in 565 S.W.2d 4.

2. That the Decree for which the Writ of Certiorari is sought to be reviewed comes out of Division 1 of the Supreme Court of the State of Arkansas from an

opinion delivered April 17, 1978. That appended hereto is a copy of said Opinion dated April 17, 1978 and marked Appendix "A".

3. The Petition for Rehearing was duly filed with the Supreme Court of the State of Arkansas and said Petition for Rehearing was denied on May 22, 1978. That appended hereto is a copy of the denial of May 22, 1978, and marked Appendix "B".

4. That the Supreme Court of the United States granted Appellants on Order Extending Time To File Petition For Writ Of Certiorari extending to and including September 20, 1978, a copy of said Order being appended hereto and marked Appendix "C".

5. That this Court has jurisdiction for filing the Writ of Certiorari under Title 28 U.S.C. §1257 (3). That an interpretation of Federal Statute dealing with Truth In Lending and Regulation Z is in question.

6. Questions presented for review expressed in the terms and circumstances of the case are as follows:

(a) The lending institution, Citizens Bank and Trust Company of Van Buren, Arkansas, did on June 5, 1974, take a Notice of Right of Rescission and back date it to May 31, 1974, intentionally. The lower Courts failed to recognize that this obvious, blatant circumvention of the law practiced on unwary consumers entitled the Appellant, Jerald V. Nietert and C. L. Goodwin, to a

Right of Rescission. The Courts have erred in declaring that the Appellants, Jerald V. Nietert and C. L. Goodwin, did receive the Notice of Right of Rescission under those circumstances. (R. 170) That the Appellants, Alice Goodwin and Doris Nietert, did not receive any Notice of Right of Rescission, nor did they sign a document evidencing that they had received such notice. The trial Court did find that the Appellee, lending institution, failed to give the Appellants, Doris A. Nietert and Alice Goodwin, a required Notice of Right of Rescission.

(b) The Court refused to grant Appellants any of the required remedies provided by federal law. These remedies that the Appellants herein are entitled to are:

(i) The Appellants were not liable for any finance charges assessed by the lending institution.

(ii) Appellants were entitled to have the security instruments they had provided the Appellee released within ten (10) days after the Appellee received the Notice of Rescission.

(iii) The Appellants attorneys were entitled to attorney's fees to be assessed by the Court and the cost of the action.

(iv) The Appellants are entitled to an extinguishment of the obligation because

of the failure of the Appellees to perform their statutory duties in the sequence contemplated by the Congress of the United States.

7. The federal statutes and regulations of which this cause is concerned is as follows:

15 U.S.C.S. §1601 page 313
15 U.S.C.S. §1635 (a) (b) (f) page 357 and 358
15 U.S.C.S. §1640 (a) (3) page 381
15 U.S.C.S. §1640 (e) page 382
12 C.F.R. §226.2 (m) (o) (1947)
12 C.F.R. §226.9 (a) (b) (c) (d)

The test of these laws is attached hereto as Appendix E.

8. That the Appellee is a banking corporation with its principal place of business in Van Buren, Arkansas. That the Appellants are individuals and all residents of Logan County Arkansas. That Appellants, Jerald V. Nietert and Doris A. Nietert moved to the State of Arkansas, arriving around June 1, 1974. The Appellants, Nieterts, contract with Appellants, Goodwins, to purchase a farm in Logan County, Arkansas, assuming a first mortgage on the property by Citizens Bank of Booneville, Booneville, Arkansas. That on June 5, 1974, the Appellants signed certain documents presented to them by the Appellee consisting of:

(a) A Promissory Note in the amount of $107,729.87,

(b) A Security Agreement and Financing Statement signed only by two of the Appellants.

(c) A document entitled Representations and Disclosures signed by only two of the Appellants,

(d) A Notice of Right of Rescission, which was pre-dated to May 31, 1974, signed by only two of the Appellants,

(e) A Real Estate Mortgage to secure the indebtedness above mentioned signed by all of the Appellants in favor of the Appellees. This was a second mortgage on the property.

On May 3, 1976, all the Appellants gave Appellees Notice of the Rescission of the transaction. They later, on May 13, 1976, gave Appellees an additional ten (10) days to perform their statutory obligations, but that Appellees failed to release any of the security documents as required by Title 15 U.S.C. §1635 (b). That subsequent to the Appellees receiving the Notice of Rescission, the Appellees filed a Petition in the Chancery Court of the Northern District of Logan County, Arkansas, seeking to foreclose on their Real Estate Mortgage dated June 5, 1974. That thereafter, Appellants filed an Answer and Counterclaim seeking

remedies under Title 15 U.S.C. §1635 (b) and Title 15 §1640 (a).

That the Chancery Court thereafter did after the hearing, order the foreclosure of the Mortgage and did in fact sell by judicial sale the property in question. Furthermore, the Court ordered interest to be paid by the Appellants from the date the case was filed. The Court failed to assess attorney's fees, costs and release of the security documents and cancel the indebtedness as requested by the Appellants and cancel the obligations as required by the previously cited law.

That the federal questions raised in this case were raised in the Court of original jurisdiction in the Chancery Court of the Northern District of Logan County, Arkansas, by pleadings filed on behalf of Appellants in that Court; by the record made in the original file of that case; all of which were set out in the Appeal to the Supreme Court of Arkansas and ruled upon by that Court.

That both the inferior and Supreme Court of Arkansas ruled that the Mortgage signed by the Appellants be ordered foreclosed and sold at a judicial sale when the security should have been released, the debt invalidated and attorney's fees and costs awarded the Appellants.

The Federal question was raised by the pleadings by way of Answer and Cross-Complaint timely filed in the Court of original jurisdiction setting forth the

defenses provided by the Consumer Credit Protection Act 15 U.S. 1601 through 15 U.S. 1640 in asking for the relief therein provided. Those pleadings appear of record in the Transcript of the trial proceedings on pages 36 through 43.

This is a case of first impression for the Supreme Court of the State of Arkansas dealing with the interpretation of the federal Consumer Protection Law and that the decision rendered by this Court is in complete contradiction with the intent and language and not in accord with applicable decisions of federal courts and the Supreme Court of the United States.

9. In accordance with Rule 23 (f) of the Rules of the Supreme Court of the United States, the following is set forth as the stage of proceedings in which the Court with original jurisdiction in the Appellate Court were apprised that federal questions sought to be reviewed were raised. The Appellants herein did, by letter dated May 3, 1976, rescind a credit transaction with the Appellees. At that point, Appellees failed to recognize the document as a rescission and to grant Appellants the remedies under Title 15 U.S.C. 1635 (b). A few months later, the Appellees filed a Petition To Foreclose on a Real Estate Mortgage executed by the Appellants. Said action was filed in the Chancery Court of the Northern District of Logan County, Arkansas, on or about November 22, 1976. Thereafter, the Appellants, with the approval of the Court, filed an Answer alleging "That Defendants readopt and reallege each and every affirmative defense and allegation contained in this

Amended Answer and the original Answer filed herein. That the Defendants state affirmatively their denials of the existence of valid documents described as Exhibits "A", "B", "C" and "D" to Plaintiff's Complaint. Defendants also assert the affirmative defense of usuary; the affirmative defense of lack of a proper rescission; the affirmative defense in that Plaintiffs did not furnish Defendants copies of proper documents which were properly prepared; that the rescission that was purportedly given was not properly prepared and not directed to the proper people; that there have been violations of both state and federal law including regulation "Z", that there have been no authorized disbursement of funds, nor have there been any release of any prior security documents including the Mortgage attached hereto and marked Exhibit "A" and the Financing Statement and Security Agreement attached hereto and marked Exhibit "B". Furthermore, that the real party in interest is the Farmers Coop of Arkansas and Oklahoma and not the Plaintiff herein.

WHEREFORE, Defendants pray that the Complaint filed herein against them by Plaintiff, be hereby dismissed at Plaintiff's cost and for all other proper relief.

That said pleading appears on page 38 in the transcript of the original proceedings. Furthermore, the Appellants filed a Counter-Claim on August 11, 1977, alleging matters which raised the federal question for review.

See Appendix F.

The issues thus raised by the pleadings substantiated by the record and made issues on appeal thus create issues of statutory construction of federal law by the State of Arkansas, as the State of Arkansas has viewed this case is one of first impression under the Federal Consumer Protection Act.

ARGUMENT

This Petition For Writ of Certiorari is requested from this honorable Court because the Supreme Court of the State of Arkansas has made a determination of federal law which are not in accord with the valid statutory construction Congress intended in enacting the Consumer Protection Laws. (15 U.S.C. §1601, etc, and applicable decisions of this Court) The Consumer Credit Protection Law gave to the state courts concurrent jurisdiction to hear cases involving violations of the Consumer Credit Protection Law. It is extremely difficult for the courts of the State of Arkansas on first impression to accept the fact that Congress has enacted laws which bring other considerations into a case other than the fact of whether or not a debtor signed a Note and Mortgage. The Arkansas courts have adopted the position that nothing other than the traditional defenses can effect the sanctity of a mortgage. The lower court even condoned a deliberate and calculated back-dating of Notice of Right of Rescission by a lending institution. This is the very thing that Congress intended to eliminate by enacting the Consumer Credit Protection Law and encouraging the informed use of credit. The Appellee, lending institution, admitted under oath that the Notice of Right of Rescission given to the debtors, Jerald V. Nietert and C. L. Goodwin, was back-dated from the date it was executed on June 5, 1974, to May 31, 1974. The record reflects that the Appellants, Nieterts, were not even in the state of Arkansas, on May 31, 1974. The Court, however, made an erroneous finding of fact that it was uncontroverted that the

Appellants, Jerald V. Nietert and C. L. Goodwin, received Notice of Right of Rescission. (This statement is found in the record at page 170)

With regard to the Notice of Right of Rescission, Mr. White, Vice-President of Citizens Bank and Trust Company of Van Buren, Arkansas, testified as follows on direct examination, to-wit:

"MR. BATCHELOR:

Q. Did you at the same time and as a part of the same transaction furnish Notice of Right of Rescission which is marked as Plaintiff's Exhibit Seven to Mr. Goodwin and Mr. Nietert?

MR. S. D. WHITE:

A. I did.

Q. You did not furnish or you did not obtain from their wives a receipt for that?

A. No, sir, I did not.

Q. Now, that instrument is dated May 31, 1974; was that signed on May 31, 1974?

A. No, sir, it wasn't.

Q. When was it signed?

A. It was signed on June the 5th." (R. 102)

From the Record of the Transcript, page 170 and 171, from the Court:

> "It boils down only to one question; it is uncontroverted that the Defendant, Jerald Nietert, Defendant, C. L. Goodwin, received notice of rescission. It is uncontroverted that Doris A. Nietert and Alice Goodwin did not receive notice of rescission.
>
> The question before this Court is the fact that the rescission was failed, the notice of rescission being failed to be given to the Defendant, Doris A. Nietert, and Alice Goodwin; does this extinguish the entire obligation?"

(i) The Appellants were not liable for any finance charges assessed by the lending institution.

The trial Judge, without any authority whatsoever to support a decision, declared that the Appellants should from November 22, 1976, pay interest on the amount of Judgment he awarded. The interest is, of course, a finance charge under the Federal Truth In Lending Act.

As alluded to in the above points, the Appellants, Alice Goodwin and Doris A. Nietert, did not receive any disclosure statements as required under Title 15 §1632 of the Federal Truth In Lending Act. Nor did they receive the §1635 Notice of Right of Rescission. They thereafter, along with their husbands, the other Appellants in this case, rescinded the transaction on May 3, 1976.

There has not been any case of any type anywhere that has arbitrarily and in direct controvention of the law required a debtor in a rescission case pay the finance charge. Title 15 §1635 (b) states in clear and specific language that when an obligor exercises his right to rescind, he is not liable for any finance or other charge.

(ii) Appellants were entitled to have the security instrument they had provided the Appellee released within ten (10) days after the Appellee received the Notice of Rescission.

Title 15 §1635 (b) and 12 C.F.R. §226.9 (a) make it clear that when a debtor is entitled to a Notice of Right of Rescission, then at such time as he elects to rescind the transaction, the creditor must within ten days release all security interest that the creditor has in debtors property and return to the debtor all funds paid on said obligation.

That statute contemplates an orderly progression of specific events culminating in the debtors tender and the creditors recoupment which never came to pass in this case. Specifically, §1635 (b) envisions responsive action on the creditor's part to a rescission notice, after which the debtor then becomes obligated to tender either the property or a sum reflecting its reasonable value. This precise statutory scheme was aborted in this case due to the Appellee's failure to comply with the

statutory requirements; hence, the Appellants responsibility to make specific statutory tender was excused by the creditor's ommissions.

To hold otherwise would create a stifling of the congressional intent for tender in the exact scheme envisioned by the statute could ever be effected by a debtor in most circumstances, namely when a creditor steadfastly refused to perform his express obligation upon receiving Notice of Rescission. In commending on this the Court in *Burley v. Bastrop Loan Co., Inc, Supra* says:

> "Congress scarcely could have contemplated such a disruptive commercial standoff. We therefore conclude that under the circumstances of this case the debtor's obligation to restore the creditor to the status quo ante was discharged by an offer accompanying Notice of Rescission, since the creditor within ten days of notification, failed to return all monies previously paid by the debtor or to reflect dissolution of the security interest."

In Appellant's letter of rescission, which was duly acknowledged and received by the Appellee, referred to as Defendant's Exhibit 2, the Appellants elected to rescind and cancel the transaction and set forth their position that they were not liable for finance charges, but recognized their obligation to return the original principal amount of the loan, after having received full credit for all payments made after June 5, 1974. In Plaintiff's Exhibit No. 14, the debtor, by their own volition, granted an additional 15 days to the Appellee extending the ten day requirement set forth in 12 C.F.R.

226.9 (a). Again, the Appellant recognized their obligation to pay the principal amount, but gave them 15 more days to perform in accordance with regulation 226.9 (a). Still the Appellees refused to comply with the law and perform their obligations.

At this point, under the *Sosa v. Fite*, 498 F. 2d 114 and *Gerasta v. Hibernia Nat. Bank*, 411 F. Supp. 176, 1976, the Courts set forth what happens if a creditor does not comply with the law. Specifically in the *Gerasta* case, the Court said:

> "Because Hibernia chose not to respond within ten days of the date upon the Plaintiff rescinded the transaction, tender by the Plaintiffs of loan proceeds ("property"), was, therefore not required and they are entitled to retention thereof without any further obligation. Although not specifically requested, the Plaintiffs are also entitled to full restitution of all amounts previously paid to Hibernia, (See *Sosa v. Fite Supra*, at 120) and to have the inscription in the public records of the Second Mortgage, if one exists cancelled."

Similarly, in this case the Appellants are not required to pay back the loan proceeds and may retain them without further obligation. Furthermore, the Appellees owe the Appellants the sum of $26,828.00, which the Appellants have previously paid to the Appellee. The Appellants are also entitled to have the inscription in public records of the Northern District of Logan County of the Second Mortgage and of the security interest taken by the Appellees cancelled. This

relief is specifically granted because of the deliberate failure of the Bank upon request to take action in accordance with §1635 (b).

The Court erred in finding Appellants are required to tender the principal amount due in order to effectuate rescission and that the same must be done before the Appellee is required to release their security interest.

The Court in the case of *Gerasta v. Hibernia Nat. Bank, Supra,* squarely dealt with the point above. In that case, the Hibernia Bank requested from the Court that it consider conditioning the Court's recognition of the Plaintiff's Right to Rescind and proper exercise thereof on compliance with an order that the debtor return to the Bank the principal loan received and further suggests that they have the power to do so. To this proposition, the Court said:

> "15 U.S.C.S. §1535 (b) provides that when an obligor exercises his right to rescind, he is automatically not responsible for any finance charge or other charge and any security interest involved and the transaction becomes void.
>
> In order to obtain possession of any property included in the loan proceeds, delivered by the creditor to the obligor, however, the creditor must take affirmative action of the type and within the time contemplated by §1635 (b). Within ten days of the rescission, the creditor must return to the obligor any money given and take such steps as are necessary or appropriate to

> reflect the termination of any security interest created. The consequences of inaction on the part of the creditor are clear. The orderly progression of specific acts contemplated by the statute, culminating in the debtor's tender of the property and the creditor's recoupment, has been disrupted and ownership of the property vest in the obligor without any obligation to pay for it."

In this case, the Appellant's property, which is the loan proceeds, should be vested in the Appellants. Furthermore, the Appellants should be entitled to Judgment against the Appellees for the amount paid them.

(iii) The Appellants attorneys were entitled to attorney's fees to be assessed by the Court and the cost of the action.

Title 15 U.S.C.S. §1640 (a) (3) provides that any creditor who fails to comply with any requirement imposed under Chapter 15 with respect to any person is liable for subparagraph (3). "In the case of any successful action to enforce foregoing liability, the cost of the action, together with a reasonable attorney's fee as determined by the Court."

As stated in Point No. A, the Appellants, C. L. Goodwin and Jerald V. Nietert, has not received a Notice of Right of Rescission under the law because S. D. White had, on behalf of the Bank, dated the Notice of Right of Rescission on May 31, 1974, and the signing of said instruments were on June 5, 1974, thereby depriving them of their three day right of rescission.

Furthermore, the trial Court found that the Notice of Right of Rescission had not been given to either Appellant, Doris A. Nietert or Appellant, Alice Goodwin. (R. 170 and 102).

As cited above, the failure to give proper Notice of Right of Rescission or notice at all as required under §1635 (a) which requires that upon Appellants giving Appellees their election to rescind the transaction, that the Appellee, Bank, must release the security. Under the Federal Truth In Lending Act, two copies of the Notice of the Right of Rescission should have been given each of the borrowers, the husband and the wife, and this was true whether or not the wife had constructive knowledge of her rights under the Act, either because of disclosures actually made to her husband or because her attorney informed her of such subsequent to the transaction. (See *Gerasta v. Hibernia Nat. Bank*, 411 F. Supp. 176, (1976)). Therefore, there has been no Notice of Right of Rescission to any of the Appellants. Therefore, Appellants are entitled to a reasonable attorney's fee for their attorneys.

In *Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, the Court held that an award of attorney's fee provision of §1640 (a) (3) are separable from the one year statute of limitations in §1640 (e). That proposition has been approved in *Sosa v. Fite*, 498 F.2d 114 and has been followed in the case of *Burley v. Bastrop Loan Co., Inc.*, 407 F. Supp. 773, (1976). In the *Burley v. Bastrop* case, the Court failed to allow the customer the statutory penalties because of the one year

statute of limitations, however, the Court found it very important that it award attorney's fee for the debtor's attorney. In that case, the Court set out what the Court should do with regard to attorney's fee. The Court said,

> "A refusal to allow attorney's fee here would be as erroneous as the earlier decisions under Landrum-Griffin, serving only to impede or chill the rights of those who would resort to judicial enforcement of their rescission rights guaranteed by the Truth In Lending Act, thus blunting congressional policy and purpose in enacting a remedial statute.
>
> Counsel for Plaintiff is directed to file a sworn statement of his claim for attorney's fees within ten days, and counsel for Defendant will be granted ten days from the date of such filing to respond to the reasonableness of the attorney's fees requested."

Thus it is clear that the trial Court in this case by totally ignoring the attorney's fee requested, has erred and impeded the congressional intent of the Federal Truth In Lending Law.

(iv) The Appellants are entitled to an extinguishment of the obligation because of the failure of the Appellees to perform their statutory duties in the sequence contemplated by the Congress of the United States.

15 U.S.C.S. §1635 (b) provides the procedure which should occur and under the law must occur to have

an orderly rescission of the transaction. Said section is set forth in appendix E.

After the Appellee received the Appellants rescission notice they did nothing that was contemplated by the Federal Truth In Lending Law. The Appellees were required within ten days after the receipt of the Notice of Rescission to return to the obligor any and all money or property given as earnest money, downpayment or otherwise, and to take the necessary steps to reflect the termination of any security interest created under this transaction. They did not release the Mortgage referred to as Plaintiff's Exhibit No. 2 (R. 270), nor had they released the security shown as Plaintiff's Exhibit No. 3 and 4. Furthermore, the creditor has not returned any money paid by the customer, nor has he tendered any money to the customer. The Note referred to as Plaintiff's Exhibit No. 1 reflects seven payments. The Appellee had received from the Appellants payments totaling the sum of $26,828.00 which they had failed to return.

Upon the Appellee's failing to release the security documents as required by law, the Appellants are entitled to have a Court Order to have the inscription in the public records of the Second Mortgage cancelled. (See *Gerasta v. Hibernia Nat. Bank*, 411 F. Supp. 176 and *Sosa v. Fite*, 498 F.2d 114).

WHEREFORE, Appellants-Petitioners herein pray this honorable Court will issue its Writ of Certiorari based upon the Petition and appendages thereto.

HIXSON AND CLEVELAND
Attorneys at Law
P. O. Drawer 607
Paris, Arkansas 72855

Attorneys for Petitioners

APPENDIX A

SUPREME COURT OF ARKANSAS

DIVISION 1

JERALD V. NIETERT, DORIS A. NIETERT, Husband and Wife; C. L. GOODWIN and ALICE GOODWIN, Husband and Wife, APPELLANTS	No. 77-396 Opinion Delivered 4-17-78 APPEAL FROM LOGAN COUNTY CHANCERY COURT – Northern Dist.
V.	HON. VAN B. TAYLOR, Chancellor
CITIZENS BANK & TRUST CO. of Van Buren, Arkansas, APPELLEE	AFFIRMED

GEORGE HOWARD, JR., Justice

GEORGE HOWARD, JR., J. The fundamental issue for resolution in this case is whether rescission of a real estate mortgage, because of the failure of the lender to disclose the debtors their right to rescind the transaction until midnight of the third business day following the closing of the transaction, as required under the Federal Truth-in-Lending Act, should be conditioned on repayment or offer of repayment of the funds advanced to the debtors.

THE FACTS

Appellants, Jerald V. Nietert and Doris A. Nietert, his wife, entered into a contract with appellants, C. L. Goodwin and Alice Goodwin, his wife, on April 19, 1973, to purchase a farm consisting of 104.75 acres in Logan County, Arkanas. At the time, Farmers Cooperative of Arkansas and Oklahoma held a mortgage on the premises which had been given by the Goodwins. Farmers Cooperative had, subsequently to its execution, assigned the mortgage and note to appellee, Citizens Bank & Trust Company of Crawford County.

On June 5, 1974, a representative of appellee, S. D. White,[1] visited the home of appellants and presented, for appellants' signatures a note, payable on demand, in the sum of $107,729.87 with interest at the rate of 9½% per annum, a real estate mortgage covering the farm in question, a security agreement involving certain personal assets and a financing statement. A written notice of right of rescission, prepared in accordance with the Federal Truth-in-Lending Act, dated May 31, 1974, was signed by C. L. Goodwin and Jerald V. Nietert as well as another document designated as a disclosure statement. It is admitted by appellee that the wives of Goodwin and

---

1. The evidence reflects that S. D. White served as credit manager for Farmers Cooperative and was also serving in the capacity as vice president in charge of agriculture credit for appellee at the time in question.

Nietert did not execute the right of rescission documents nor was a copy delivered to them.

A contract for the purchase of chickens from Ken Ballew Hatcheries, Inc., was also executed by C. L. Goodwin and Jerald V. Nietert, Farmers Cooperative and Ken Ballew Hatcheries, Inc.[2]

On February 5, 1976, there existed a balance due on the note in the sum of $96,704.78. Appellee-plaintiff made demand for payment which was refused by appellants.[3]

However, the attorney for appellants on May 3, 1976, wrote the following letter to Dane Riggs, president of appellee-bank:

"Dear Mr. Riggs:

"As you are now aware, Mr. J. H. Evans and myself represent Mr. and Mrs. Jerald V. Nietert and Mr. and Mrs. C. L. Goodwin in regard to that certain

---

2.
The $107,729.87 note was to be applied as follows: (a) $77,729.87 represented the renewal of a note executed by the Goodwins on July 24, 1973, in the sum of $94,577.08 with a balance due in the sum of $77,729.87; (b) the balance in the sum of $30,000.00 represented a cash advance to appellants to purchase 30,000 hens from Ken Ballew Hatcheries, Inc.

3.
Citizens Bank of Booneville held a first mortgage on the lands in question pursuant to a mortgage executed on July 16, 1971, by C. L. Goodwin and Alice Goodwin securing a loan in the sum of $27,548.00. This indebtedness is not in issue in this case.

transaction between our clients and the Citizens Bank and Trust Company on June 5, 1974.

"It is our clients' position that the Notice of Right of Rescission as required by Regulation Z as amended, the Truth and Lending Act as amended, Section 226.9 was not furnished to the Nieterts and the Goodwins as required by law. Our clients therefore do hereby elect to rescind and cancel the aforesaid transaction entered into the Citizens Bank and Trust Company on June 5, 1974.

"The exercise of this Right of Rescission renders the entire transaction void and voids any security interest which the Citizens Bank and Trust Company might have had by virtue of this transaction. Furthermore, our clients are not liable for any finance charges which have accrued since June 5, 1974. *Our clients are obligated, however, to return the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974.*

"Please advise as to the total payments that Citizens Bank and Trust Company have received since June 5, 1974, on said indebtedness, so that we may calculate the amount of refund owed by our clients to the Citizens Bank and Trust Company.

"We will expect to hear from you at your earliest possible convenience." (Emphasis added)

On May 13, 1976, the following letter was sent to Mr. Riggs by appellants' attorney:

"Dear Mr. Riggs:

"I am writing this letter to confirm my previous discussions with you and Mr. Bachelor. On May 3, 1976, I advised you that Jerald V. Nietert and C. L. Goodwin were electing to rescind that certain transaction with the Citizens Bank and Trust Company on June 5, 1974.

"By this letter, I hope to clarify our position. As noted in my previous letter, *my clients are obligated to pay the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974. However, since this will necessitate my clients obtaining a loan elsewhere, they are willing to pay interest at the rate reflected in the original note from May 3, 1976,* until the aforesaid principal amount of the note is paid. Furthermore, I will assure you that if we can reach an agreed settlement, my clients will immediately make application to the Farmers Home Administration for the necessary funds to repay this principal amount due.

"In addition to the above, at Mr. Bachelor's request, we are agreeable to extending the 10 day requirement set out in Section 226.9 an additional 15 days in order that you might further discuss this matter with your Board of Directors.

"If you need any further information, or have any questions, please contact me at your convenience." (Emphasis added)

The essential pleadings filed in this action consist of a foreclosure action filed November 22, 1976, by appellee in the Logan Chancery Court; and an answer and counterclaim filed by appellants asserting non-compliance with rescission notice provisions of the Truth-in-Lending Act as a bar to appellee-plaintiff's foreclosure action. Specifically, appellants asserted that once notice to rescind the transaction was served on appellee, appellee had ten days in which to release all security interest in the real estate involved and having failed to do so, appellee has not only forfeited the finance charges, but is precluded from recovering the money advanced; and that appellee is entitled to a release of the security and reasonable attorney's fees.

Appellee responded to the counterclaim asserting that in conjunction with appellants' rescission notice, appellants made an offer of settlement which appellee accepted; that the settlement provided essentially that there would be a simultaneous release of security and tender of the money advanced by appellee; and that appellee has been ready and willing to satisfy the security, but appellants have not made a tender of the funds advanced as provided for in the settlement arrangement. Appellee further asserted that in reliance upon the settlement, appellee withheld its foreclosure action for several months in order to afford appellants time to secure the necessary funds to repay the money advanced.

HOLDING OF THE TRIAL COURT

"...[T]he proper notice of Right of Rescission under the Truth in Lending Act of the Congress of the United States...was not given to all the proper parties and the parties were entitled to rescind said instruments on May 3, 1976, upon tender of payment of the principal amount due, without interest or financing charges of any kind; and were entitled to have all mortgages, financing statements or other security interest satisfied and released upon Defendants tendering to Plaintiff said sum of $80,701.87. Plaintiff is now entitled to Judgment as hereinabove set out and to foreclosure of their Mortgage hereinabove described.

"...Defendants are not entitled to attorney's fees or statutory penalties under United States Law."

THE DECISION

I.

RIGHT OF RESCISSION

Relevant statutory provision of the Federal Consumer Credit Disclosure Act, Title 15, U.S.C., §1635 is as follows:

> "(a)...[I]n the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, *the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, or his intention to do so.* The creditor shall clearly and conspiciously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this transaction.
>
> "(b) When an obligor exercises his right to rescind..., he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. *Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.*[4] If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the

4.
Even though this schedule is inconsistent with the traditional common law requirements of rescission, Congress has the power to alter the common law. *Palmer v. Wilson*, 359 F. Supp. 1099 (1973).

property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it." [5](Emphasis added)

The evidence reflects clearly that appellee extended to C. L. Goodwin and Jerald V. Nietert the right to rescind the transaction within the meaning of the statute by delivering the necessary documents to them, but the evidence further reflects that their wives were not presented the necessary documents for rescission, nor did appellants' wives execute an acknowledgment of receipt of such documents. Consequently, appellee breached its duty to disclose to appellants their right to rescind this transaction until midnight of the third business day following the consummation of the transaction and such right

5.
The congressional declaration of the purpose of the disclosure requirements is to aid consumers in deciding for themselves the reasonableness of credit charges imposed and to enable them to effectively shop for credit. *Mourning v. Family Publications Service, Inc.*, 449 F.2d 235 (1971).

continued until appellee had delivered the disclosures required. [6] *See: Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176 (1975).

While the evidence in this case established that appellants advised appellee, by communication dated May 3, 1976, and May 13, 1976 that appellants were rescinding the transaction, appellants on the other hand, proposed an offer of settlement on terms and conditions that ~~or~~ contrary to the statutory scheme of the Truth-in-Lending Act. Under the statute, where an obligor exercises his right to rescind, he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten day after receipt of notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment or otherwise, and shall take any action necessary to reflect the termination of any security interest created under the transaction. Upon the performance of the creditor's obligation under the Act, the obligors shall tender to the creditor the property received under the transaction. If the creditor does not take possession of the property within ten days after tender, ownership of the property vests in the obligor without obligation to pay for it.

6.
In 1974, the act was amended to provide that an obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required have not been delivered to the obligor.

The evidence also reflects that the appellants made application for loans at five financial institutions—Citizens Bank of Booneville, First National Bank at Paris, First National Bank of Fort Smith, American National Bank at Charleston and Federal Land Bank—seeking to secure funds with which to repay the principal sum due appellee, but these applications were all denied. It is clear that appellants have now changed their posture with reference to the settlement offer made and accepted by appellee by insisting now that they are not willing to repay any principal due appellee because appellee-bank did not release the security within ten days after notice of rescission in accordance with the Act. It is readily obvious that appellants did not have the necessary funds, nor were there any prospects for securing funds to repay the money advanced by appellee. Consequently, in desperation, appellants seek to invoke the statutory scheme to the detriment of appellee by endeavoring to free the assets of appellee's lien and leaving appellee without any protection whatsoever. A court of equity cannot close its eyes to such an invidious scheme disguised in the name of consumer protection which has as its main objective to defeat the security interest of a creditor who has cooperated with the debtor fully and even during trial offered to withhold action on its foreclosure suit in order to give appellants additional time to secure funds to pay appellee.

In this case, the appellants-obligors requested the appellee-creditor to apply all sums paid by appellants as credit to funds received by appellants instead of refunding these funds to appellants, as required by law.

In addition, appellants advised appellee, in effect, to disregard the time schedule contained in the Act for the performance of the creditor's duties since appellants will need time to arrange a loan in order to repay the money advanced by appellee. Moreover, appellee's vice president testified that appellee-bank accepted the offer of settlement and readily acknowledged that as a consequence of appellee's failure to disclose the right to rescind to the wives of appellants, appellee had forfeited the finance charges and would be entitled only to the funds advanced. The vice president also testified as follows:

> "Q. I'll ask you, have you as president of the bank offered and been willing, ready, and able since May 13, 19 and 76 (sic) to satisfy every security instrument you have upon payment of the balance due?
>
> ...
>
> "A. Yes, sir the principle (sic) with interest from May the 3rd, 1976, we offered to do that.
>
> ...
>
> "Q. Since he asked you, Mr. Riggs, were you willing to satisfy or release those documents at anytime on payment of the principle (sic) balance due?
>
> "A. That was the ~~just~~ gist of every conversation that we had, commencing with the March conversation of '76 in which Mr. Nietert...and Mr. Lippard were present. It's been the ~~jest~~ of every conversation that I've had subsequent to that.

> The problem has been apparently that Mr. Nietert has been unable to obtain the funds from whatever source to pay the indebtedness with."

Under the circumstances existing in this case, we conclude that the trial court's holding that appellants were not entitled to a release of the mortgage until appellants had tendered payment of the principal amount due without interest and finance charges is supported by a preponderance of the evidence. *See: LaGrone v. Johnson*, 534 F. 2d 1360 (1976).

The facts in this case are to be distinguished from those in *Sosa v. Fite*, 498 F. 2d 114 (1974) where the Court granted a right of rescission without requiring a tender or offer of tender of the principal sum due by the debtor. There the debtor served a notice to rescind and insisted that the statutory scheme be followed. Moreover, the Court in *Sosa*, found that even after the debtor had elected to rescind the transaction, the creditor refused to respond to the notice of rescission and steadfastly refused to perform his obligations required under the Act. Furthermore, the Court in *Sosa* also found that the creditor there was one of dubious reputation; and his workmanship in connection with repairs and improvements made on the home of the debtor was of poor quality. In the instant case, appellee-creditor readily acknowledged, upon receipt of notice of rescission, that it was entitled only to the principal sum advanced and stood ready and willing to satisfy the security upon payment of the principal sum in accordance with the settlement often made by the debtors.

II.

ATTORNEY'S FEES

Under §1640 (a), U.S.C., it is provided, in pertinent part as follows:

> "(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> > "(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
> >
> > "(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court."

In *Sosa v. Fite*, 498 F. 2d 114 (1974), the Court gives a cogent and comprehensive analysis of the provisions in the Federal Truth-in-Lending Act calling for attorney's fees. In relevant part, the Court said:

> "...[W]e begin with the settled proposition that congressional goals underlying the Truth-in-Lending Act include the creation of 'a system of private attorney generals who will be able to aid the effective enforcement of the Act.' ...Thus, an individual suit on a private cause of

> action under Truth-in-Lending may nonetheless have public dimensions, since successful efforts directed toward vindicating private rights will aid in bringing about compliance with the regulatory scheme...Additional public-related benefits are provided by the *stare decisis* effect successful litigation may have entitling others to statutorily provided relief...Sosa has therefore effectuated a strong congressional policy and is entitled to attorneys' fees, in the exercise of the court's discretion, even though the statute sued under does not expressly provide for such an award...Moreover, the fact that other parts of the same statute do provide for attorneys' fees does not foreclose an award under provisions which are silent on the matter, so long as the suit is one which vindicates congressional policy..."

In *Sosa*, the creditor refused to respond to the debtor's notice of rescission and failed to recognize and abide by the plain operations of the rescission remedy. Thus, the debtor was compelled to resort to federal court for relief. Here, the creditor readily admitted its obligations under the Act and withheld foreclosure action on the note and mortgage executed by appellants pending compliance on the part of debtors with the terms of the settlement offer. After a period of several months, the appellee-creditor finally instituted its foreclosure action. Consequently, the instant case is not on all fours with *Sosa*. Moreover there are two additional reasons why appellants are disentitled to recover attorney's fees:

> 1. The civil relief provided a debtor under 1640 (a) has a one year limitation period which commences from the date of consummation of the transaction. The instant transaction was consummated on June 5, 1974, and appellee's complaint was filed November 27, 1976, and appellants' counterclaim was filed August 10, 1977. *See:* Title 15 U.S.C., §1640 (e). *See also: Gillis v. Fisher Hardware Co.*, 289 So.2d 451 (1974), where the Court held that the one year statute of limitations contained in this section was applicable to a counterclaim asserted in a foreclosure action.
>
> 2. The debtors in this action have not been successful in their counter action against the appellee. Therefore, it cannot be stated that the appellants have effectuated in any way a strong congressional policy.

AFFIRMED.

We agree, Harris, C. J., and George Rose Smith and Hickman, JJ.

APPENDIX B

STATE OF ARKANSAS,)
(SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D. 1977, amongst others were the following proceedings, to-wit:

On the 22nd day of May, A.D. 1978, a day of said term_____

Jerald V. Nietert, et al
Appellant

VS. No. 77-396 — Appeal from Logan Chancery Court

Citizens Bank & Trust Co. of Van Buren, AR — Northern District
Appellee

Appellants' petition for rehearing is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 21st day of August, A.D. 1978.

/s/ Jimmy H. Hawkins
Clerk

By_____
D.C.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-207

JERALD V. NIETERT, ET AL.,
Petitioners,

v.

CITIZENS BANK & TRUST COMPANY, ETC.

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 20, 1978.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 31st
day of August, 1978.

APPENDIX D

IN THE CHANCERY COURT OF
LOGAN COUNTY, ARKANSAS
NORTHERN DISTRICT

CITIZENS BANK & TRUST COMPANY
of Van Buren, Arkansas PLAINTIFF

VS. CASE NO. E-76-106

JERALD V. NIETERT and DORIS A. NIETERT, Husband and Wife; C.L. GOODWIN and ALICE GOODWIN, Husband and Wife DEFENDANTS

JERALD V. NIETERT, DORIS A. NIETERT, C. L. GOODWIN and ALICE GOODWIN COUNTERCLAIM PLAINTIFFS

VS.

CITIZENS BANK & TRUST COMPANY of Van Buren, Arkansas COUNTERCLAIM DEFENDANT

PRECEDENT

On this 28th day of September, 1977, this cause comes on for hearing. The Plaintiff appeared in person and/or by his attorney, Lonnie Batchelor, and announced ready for trial. That Defendants, Jerald V. Nietert, Doris A. Nietert and C. L. Goodwin appeared

in person and by their attorneys, Hixson and Cleveland, and Defendant, Alice Goodwin appeared through her attorneys, Hixson and Cleveland, and all Defendants announced ready for trial. Thereupon the cause was submitted to the Court upon the pleadings, the testimony of the parties and witnesses and the exhibits therewith introduced by the parties, the briefs submitted by counsel for the parties, and from all of which the Court does find:

I.

The Court finds that the Plaintiff is a corporation engaged in a general banking business in Van Buren, Arkansas, and the Defendants, Jerald V. Nietert and Doris A. Nietert, are husband and wife and residents of the Northern District of Logan County, Arkansas, and the Defendants, C. L. Goodwin and Alice Goodwin, are husband and wife and also residents of the said county and district.

II.

The Court further finds that on June 5, 1974, said Defendants and each of them became indebted to the Plaintiff, Citizens Bank & Trust Company of Van Buren, Arkansas, in the sum of $107,729.87 and on that date executed and delivered to Plaintiff their joint Promissory Note for said amount payable on demand at the office of Plaintiff in Van Buren, Arkansas, with interest from date until paid at the rate of 9½% per annum.

III.

The Court further finds that on the same date for the purpose of securing payment of the Note and indebtedness described above, all of said Defendants executed and delivered to Plaintiff their Real Estate Mortgage mortgaged to the following described real estate situated in the Northern District of Logan County, Arkansas, to-wit:

> The South Half of the Southeast Quarter of the Northeast Quarter, 20 acres, the Northeast Quarter of the Southeast Quarter, 40 acres, and all that part of the Southeast Quarter of the Southeast Quarter North of Six Mile Creek, 39.75 acres, more or less, all in Section 18; and all that part of the Northeast Quarter of the Northeast Quarter of Section 19 North of Six Mile Creek, 5 acres, more or less, all in Township 7 North, Range 27 West.

Said Mortgage was filed for record in the Northern District of Logan County, Arkansas, on June 7, 1974, and recorded in Book 60 at page 64.

IV.

The Court further finds that certain payments were made on said Note, some being made on behalf of Jerald V. Nietert and Doris A. Nietert by Farmers Coop of Arkansas and Oklahoma and one being made by Jerald V. Nietert, and that after crediting all payments to principal and none to interest, the amount of principal remaining due on November 22, 1976, was

the sum of $80,701.87, and Plaintiff is now entitled to Judgment against the Defendants, Jerald V. Nietert and Doris A. Nietert, C. L. Goodwin and Alice Goodwin, jointly and severally for said sum of $80,701.87 plus interest thereon from November 22, 1976, the date of commencement of this action in this Court until paid at the rate of 9½% per annum plus all costs herein. Further, the Court finds the interest charged by Plaintiff to Defendant is that set forth on said Promissory Note. The total amount of interest and principal paid by Defendants to Plaintiff on said Promissory Note is the sum of $27,028.00.

V.

The Court further finds that at the time of the execution of the Note and Mortgage hereinabove described, the proper notice of Right of Rescission under the Truth In Lending Act of the Congress of the United States and Regulation Z issued thereunder was not given to all the proper parties and the parties were entitled to rescind said instruments on May 3, 1976, upon tender of payment of the principal amount due, without interest or financing charges of any kind; and were entitled to have all mortgages, financing statements or other security interest satisfied and released upon Defendants tendering to Plaintiff said sum of $80,701.87. Plaintiff is now entitled to Judgment as hereinabove set out and to foreclosure of their mortgage hereinabove described.

VI.

The Court finds that Defendants are not entitled to attorney's fees or statutory penalties under United States Law.

VII.

The Court further finds that Citizens Bank of Booneville, Booneville, Arkansas, has and holds a First Mortgage upon the land which is dated July 16, 1971, which was filed for record in the Northern District of Logan County on July 29, 1971, and recorded in Record Book 53 at page 369, which secured an original indebtedness of $32,300.00, due and payable at the rate of $412.89 per month for 120 months, beginning August 20, 1971. That the foreclosure of the Mortgage hereinabove described is subject to said Mortgage to Citizens Bank of Booneville, Booneville, Arkansas, and the indebtedness secured thereby.

VIII.

The Court further finds that Defendants should be and are given ten days from the date hereof to pay said indebtedness of $80,701.87 with interest from November 22, 1976, to the date of such payment at the rate of 9½% per annum plus the Court costs herein, and in the event of their failure to pay same within said time, it is the judgment of the Court that said Mortgage be foreclosed and that Clarence Phillips, Clerk of this Court, be appointed Commissioner to make the sale as provided by law.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Plaintiff have Judgment against the Defendants Jerald V. Nietert and Doris A. Nietert, C. L. Goodwin and Alice Goodwin, both jointly and severally, for the sum of $80,701.87 plus interest from November 22, 1976, until full payment at the rate of 9½% per annum and plus Court costs herein; that Defendants are given ten days from the date hereof for payment of said sum into the Registry of this Court; that upon failure to pay said sum within the time fixed, all right, title and interest of the Defendants and each of them, including dower and homestead of the wives, if any, be and the same is foreclosed; that in the event of such nonpayment, Clarence Phillips, Clerk of this Court, is appointed as Commissioner for the purpose of making the sale of the land described, the sale to be first advertised and in all respects conducted in accordance with the law in such cases provided, and with his action to be reported to the Court for confirmation as required by law, and at which sale the Plaintiff shall have the right to purchase in all respects as any and all other parties; that such sale so made shall be subject in all respects to the First Mortgage of Citizens Bank of Booneville, Booneville, Arkansas, which is dated July 16, 1971, and recorded in Record Book 53 at page 369, and it is directed that in the advertisement of said land for sale that it be specifically stated that the sale is subject to said Mortgage to Citizens Bank of Booneville.

/s/ Van B. Taylor
CHANCERY JUDGE

APPROVED AS TO FORM:

/s/ Lonnie Batchelor
LONNIE BATCHELOR, Attorney for Plaintiff

/s/ Herschel W. Cleveland
HERSCHEL W. CLEVELAND, Attorney for Defendants

APPENDIX E

15 U.S.C.S. §1601. Findings and declaration of purpose

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 USCS §§1601 et seq.] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(May 29, 1968, P.L. 90-321, Title I, c. 1, §102, 82 Stat. 146; Oct. 28, 1974, P.L. 93-495, Title III, §302, 88 Stat. 1511.)

15 U.S.C.S. §1635. Right of rescission as to certain transactions.

(a) Transactions involving security interest in real property, generally. Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter [15 USCS §§1631 et seq.], whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

(b) Effect of rescission. When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void

upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor within obligations on his part to pay for it.

(f) Expiration of right of rescission. An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this chapter [15 USCS §§1631 et seq.] have not been delivered to the obligor.

(May 29, 1968, P.L. 90-321, Title I, Chapter 2, §125, 82 Stat. 152; Oct. 28, 1974, P.L. 93-495, Title IV, §§404, 405, 412, 88 Stat. 1517, 1519.)

15 U.S.C.S. §1640. Civil liability

(a) Amount of liability. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter [15 USCS §§1631 et seq.] or chapter 4 of this title [15 USCS §§1666 et seq.] with respect to any person is liable to such person in an amount equal to the sum of—

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(e) Jurisdiction; period of limitations. Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

12 CFR 226.2 (m) "**Creditor**" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

12 CFR 226.2 (o) "**Customer**" means a natural person to whom consumer credit is offered or to whom it is or will be extended, and includes a comaker, endorser, guarantor, or surety for such natural person who is or may be obligated to repay the extension of consumer credit.

12 CFR §226.9 – RIGHT TO RESCIND CERTAIN TRANSACTIONS

(a) **General rule.** Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this Part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business.

* * * (b) **Notice of opportunity to rescind.** Whenever a customer has the right to rescind a transaction under paragraph (a) of this section, the creditor shall give notice of that fact to the customer by furnishing the customer with two copies of the notice set out below, one of which may be used by the customer to cancel the transaction. Such notice shall be printed in capital and lower case letters of not less than 12 point bold-faced type on one side of a separate

statement which identifies the transaction to which it relates. Such statement shall also set forth the entire paragraph .

(d) of this section, "Effect of rescission." If such paragraph appears on the reverse side of the statement, the face of the statement shall state: "See reverse side for important information about your right of rescission." Before furnishing copies of the notice to the customer, the creditor shall complete both copies with the name of the creditor, the address of the creditor's place of business, the date of consummation of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation. Where the real property on which the security interest may arise does not include a dwelling, the creditor may substitute the words "the property you are purchasing" for "your home," or "lot" for "home," where these words appear in the notice. * * *

(c) **Delay of performance.** Except as provided in paragraph (e) of this section, the creditor in any transaction subject to this section, other than an extension of credit primarily for agricultural purposes, shall not perform, or cause or permit the performance of, any of the following actions until after the rescission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(1) Disburse any money other than in escrow;

(2) Make any physical changes in the property of the customer;

(3) Perform any work or service for the customer; or

(4) Make any deliveries to the residence of the customer if the creditor has retained or will acquire a security interest other than one arising by operation of law.

(d) **Effect of rescission.** When a customer exercises his right to rescind under paragraph (a) of this section he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the custom ". If the creditor does not take possession of

the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

APPENDIX F

COUNTERCLAIM

"That the Counterclaim Defendant, Citizens Bank and Trust Company of Van Buren, Arkansas, did on the 22nd day of November, 1976, file a Complaint in Equity against the Counterclaim Plaintiffs, Jerald V. Nietert, Doris A. Nietert, C. L. Goodwin and Alice Goodwin. That the Counterclaim Defendant, Citizens Bank and Trust Company of Van Buren, Arkansas, has failed and refused to release all security documents and all mortgages as required by law.

That Counterclaim Defendants allege that Counterclaim Plaintiff did on or about the 5th day of June, 1974, sign a Note for ONE HUNDRED SEVEN THOUSAND SEVEN HUNDRED TWENTY-NINE DOLLARS and 87/100 ($107,729.87). That said Counterclaim Defendants did not supply Counterclaim Plaintiffs with the proper rescission documents. That the Counterclaim Plaintiffs did in the proper time and in the manner required by law, rescind said transaction. That since the rescission of this transaction that security documents required to be released by law have not yet been released. That the Counterclaim Plaintiff's are entitled to all civil remedies allowed by law against the Counterclaim

Defendants. That the Counterclaim Defendants did not comply with state and federal law in the execution of their alleged security documents. That the officer acting jointly on behalf of the bank and on behalf of the coop presented to the Counterclaim Plaintiffs, documents which Counterclaim Plaintiffs signed. That the time such documents were presented to Counterclaim Plaintiffs, they were blank and were later filled in. That copies of the documents were not given to Counterclaim Plaintiffs as required by law, nor was the right of rescission given Counterclaim Plaintiffs. That in addition thereto, the agent and officer of the bank and the Farmers Coop of Arkansas and Oklahoma, did not have the signatures to said security documents, including mortgages, properly notarized. That said documents were purportedly notarized by an individual who was neither present nor familiar with the signatures of those involved.

That the Counterclaim Defendant has not properly disbursed funds as required by law, nor has said Counterclaim Defendant disbursed without the authority of Counterclaim Plaintiffs any and all monies alleged by Counterclaim Defendants to be obligations of Counterclaim Plaintiffs.

WHEREFORE, the Counterclaim Plaintiffs pray that they have and recover a rescission from Counterclaim Defendants; that they have and recover of and from Counterclaim Defendants all damages sustained by them as a result of the failure of

Counterclaim Defendants to comply with state and federal law; that each of the Counterclaim Plaintiff have and recover the sum of ONE THOUSAND DOLLARS ($1,000.00); that each of the Counterclaim Plaintiff have and recover the cost of this action together with a reasonable attorney's fee as determined by the Court; that any and all security documents claimed to be held by Counterclaim Defendant be hereby determined to be invalid and held for naught; that any and all alleged obligations claimed by Counterclaim Defendant against Counterclaim Plaintiff be hereby dismissed and discharged forever; and for all other proper relief as provided by law."

Said Counterclaim is found in the record at page 57 through 60.

The Court in its decision found the following:

V.

The Court further finds that at the time of the execution of the Note and Mortgage hereinabove described, the proper notice of Right of Rescission under the Truth In Lending Act of the Congress of the United States and Regulation Z issued thereunder was not given to all the proper parties and the parties were entitled to rescind said instruments on May 3, 1976, upon tender of payment of the principal amount due, without interest or financing charges of any kind; and were entitled to have all mortgages, financing statements or other security interest satisfied and

released upon Defendants tendering to Plaintiff said sum of $80,701.87. Plaintiff is now entitled to Judgment as hereinabove set out and to foreclosure of their Mortgage hereinabove described.

VI.

The Court finds that Defendants are not entitled to attorney's fees or statutory penalties under United States Law.

VII.

The Court further finds that Citizens Bank of Booneville, Booneville, Arkansas, has and holds a First Mortgage upon the land which is dated July 16, 1971, which was filed for record in the Northern District of Logan County on July 29, 1971, and recorded in Record Book 53 at page 369, which secured an original indebtedness of $32,300.00, due and payable at the rate of $412.89 per month for 120 months, beginning August 20, 1971. That the foreclosure of the Mortgage hereinabove described is subject to said Mortgage to Citizens Bank of Booneville, Booneville, Arkansas, and the indebtedness secured thereby.

VIII.

The Court further finds that Defendants should be and are given ten days from the date hereof to pay said indebtedness of $80,701.87 with interest from November 22, 1976, to the date of such payment at the

rate of 9½% per annum plus the Court costs herein, and in the event of their failure to pay same within said time, it is the judgment of the Court that said Mortgage be foreclosed and that Clarence Phillips, Clerk of this Court, be appointed Commissioner to make the sale as provided by law."

IN THE

Supreme Court Of The United States

JERALD V. NIETERT AND DORIS A. NIETERT, HUSBAND AND WIFE; C. L. GOODWIN AND ALICE GOODWIN, HUSBAND AND WIFE ..... *Petitioners*

VS. NO. 78-457

CITIZENS BANK & TRUST COMPANY OF VAN BUREN, ARKANSAS ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FINES F. BATCHELOR, JR.
411 Main (P.O. Drawer L)
Van Buren, Arkansas 72956
Attorney for Respondent

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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STATEMENT

So far as the Petition for Writ of Certiorari filed herein complies with the United States Supreme Court Rule 23, 28 U.S.C.A., in presenting a concise statement of the grounds upon which the jurisdiction of this Court is invoked and showing the pertinent judgments, dates, statutory provisions, etc., the respondent does not materially disagree. It is not a concise statement of the case containing the facts material to the consideration of the questions presented and in many instances the same contains conclusions of counsel for petitioners, it is argumentative and statements of purported facts are not supported by the preponderance of the evidence or no evidence whatever. Therefore the following brief statement of the facts as we understand them is submitted.

There has never been any record title or evidence of title whatever in the petitioners, Nieterts, and their interest in the mortgaged property was unknown by respondent until their contract was introduced at the time of the hearing in the trial court. That contract which is not of record discloses an agreement to purchase this property from the petitioners, Goodwin, on the 19th day of April, 1974.

Prior to June 5, 1974, the petitioners made application to S. D. White who was an official of Citizens Bank & Trust Company of Van Buren, Arkansas, the respondent, and also of the Farmers Coop of Arkansas and Oklahoma, to refinance a then existing indebtedness of petitioners, Goodwin, to Farmers Coop of Arkansas and Oklahoma in the sum of $77,729.87 which was then secured by mortgage upon the lands here involved and also by security agreement and financing statement covering chickens and laying house equipment, and which note, mortgage, and security interest had been assigned to the respondent bank, and for the advancement of an additional $30,000.00 with which to purchase chickens. On June 5, 1974, all of the petitioners executed note for $107,729.89 to the respondent bank which covered the then existing principal indebtedness of $77,729.87 plus an additional advancement of $30,000.00 for the purchase of chickens to be housed and grown on the farm land, together with real estate mortgage covering the land, and security agreement and financing statement covering the chickens and equipment then on the farm plus the additional 30,000 chickens then being acquired. On June 5th, Mr. White, the loan officer, gave notice of the right of rescission to Mr. C. L. Goodwin and Mr. Gerald Nietert and they signed therefor. He clearly failed to give any such notice to Mrs. Goodwin or Mrs. Nietert or he failed to obtain

their signatures thereto. The note evidencing the indebtedness was due on demand.

In the spring of 1976 the lending bank requested or demanded payment and on May 3, 1976 the borrowers, petitioners, through the letter of their attorneys at that time, Mr. C. Richard Lippard of Booneville, Arkansas and Honorable J. H. Evans of Fort Smith, Arkansas, formerly Chancellor of the Tenth Chancery District of Arkansas, delivered to the bank, the respondent, notice that they elected to rescind and cancel the transaction entered into with the bank on June 5, 1974, such notice being in the form of a letter addressed to Mr. Dane Riggs, president of the bank, and which letter is copied in full in the opinion of the Supreme Court of Arkansas, Appendix "A" of petitioners' printed Petition and Argument in Support Thereof. This letter advised the bank that the borrowers had elected to rescind the entire transaction, that they were not liable for any financing charges which had accrued from and after June 5, 1974, but that their clients were obligated to return the original principal amount of the loan after having received full credit for all payments made from the time of the inception of the loan. This letter concluded with the request that the bank advise the total payments received from and after June 5, 1974 on said indebtedness in order that they may calculate the amount of refund owed by the borrowers to the lending institution.

Thereafter the respondent received an additional letter from counsel for the petitioners which was dated May 13, 1976, which referred to and confirmed the previous letter and discussions with Mr. Riggs, president of the bank and the bank's attorney, and reaffirming that the obligors were obligated to pay the original amount of the loan less

previous payments thereon. There was no request, demand, or suggestion in either letter that the bank, the respondent, should satisfy and release its security instruments until the original amount of the indebtedness, less payments theretofore made thereon, had been refunded.

The respondent bank agreed to accept the principal exactly as outlined in the two letters and continued to be willing to accept the same to the date of the trial of the action in the trial court. After a delay from May 13, 1976 to November 22, 1976, a period of approximately six months with no apparent progress by borrowers in obtaining funds or paying the principal, the lending bank filed suit for foreclosure of the mortgage and other security instruments. Answer containing a general denial of the allegations of the complaint was filed on February 9, 1977. Various other pleadings were filed by the defendants, petitioners, including a cross-complaint against Farmers Coop of Arkansas and Oklahoma and S. D. White. This cross-complaint was stricken and dismissed, the trial proceeded only against the respondent here, and there is no appeal from the order dismissing the cause of action against Farmers Coop of Arkansas and Oklahoma and S. D. White.

On August 11, 1977 the petitioners, defendants in the trial court, filed a counterclaim against the respondent here in which they reaffirmed matters set up in the answer and amendment to answer and in which they first prayed that they recover a reasonable attorney's fee as determined by the court. This counterclaim was filed long after time, it was filed without permission of the court and after the suit had been pending for approximately eleven months. It is only in the amended answer and in the counterclaim that

the defendants, petitioners, first indicate that there was a refusal to satisfy and release the mortgage and other security instruments; prior to that time there had been no such demand, it being the previous position that the bank had forfeited all financing charges and that it was the duty of the appellants to refund the principal amount less all sums previously paid. The judgment of the trial court was that the petitioners should pay the principal after allowing credit for all payments made thereon, this judgment was affirmed by the Supreme Court of the State of Arkansas, and it is this judgment which petitioners would review.

BRIEF AND ARGUMENT

Counsel for petitioners have devoted a major portion of their petition and argument to the proposition that the court erred in finding that two of the petitioners, defendants in the trial court, Jerald V. Nietert and C. L. Goodwin, received notice of the right of rescission. From the very time of the receipt of the notice of rescission by the respondent lending institution on May 3, 1976, it has admitted that two of the petitioners were not properly served with notice of the right of rescission and therefore that all of the borrowers had that right. The trial court found that the real issue in the trial and the only issue to be decided by the court was whether or not the failure of appellee to give the proper notice of the right of rescission to Mrs. Nietert and Mrs. Goodwin relieved all of the defendants, petitioners, of their obligation of paying the principal and interest due under the note, mortgage and security agreement; that if any of the defendants failed to receive the notice of the right of rescission then all had the right to rescind. The court further found that all of the defendants had the right to and did rescind and thereupon the lender was obligated to return any advancement, down payment or whatever it may have received from the obligors and to release the security instruments. Likewise, the court found that the obligors were obligated to return any funds they received under the agreement as indeed they themselves proposed and the bank or creditor was obligated to accept the same. It was not a question then and it is not a question now whether proper notice was given — it is admitted that the proper notice was not given and the court has so held. It is not a question of whether there was the right of rescission — the court has held there was such right.

It is apparent throughout the petition and brief that the real complaint is the court's interpretation of the statute and regulation and the duties and responsibilities of the parties when notice was not given and the right of rescission existed.

The interpretation of the statute and the regulation and the duties and responsibilities of the parties arising thereunder was first outlined and stated by counsel for these petitioners in a letter dated May 3, 1976, notifying the bank that they had elected to rescind the entire transaction, which letter is copied in full in the opinion of the Supreme Court of Arkansas, Petitioners' Appendix "A", pages 24 and 25, and which states in part:

> "The exercise of this Right of Rescission renders the entire transaction void and voids any security interest which the Citizens Bank and Trust Company might have had by virtue of this transaction. Furthermore, our clients are not liable for any finance charges which have accrued since June 5, 1974. Our clients are obligated, however, to return the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974.
>
> "Please advise as to the total payments that Citizens Bank and Trust Company have received since June 5, 1974, on said indebtedness, so that we may calculate the amount of refund owed by our clients to the Citizens Bank and Trust Company."

The interpretation placed upon the statute and regulation by the court was the exact same interpretation placed thereon by petitioners in the above letter of May 3, 1976, that is, that the lender had forfeited all financing charges but it was the duty of the obligors to tender and pay the

original amount of the loan advanced after having received full credit for all payments theretofore made. The court further held that the penalty for failure to comply with the Truth In Lending Statute and Regulation Z was that the lender had forfeited all financing charges in connection with the loan and that the borrower was only obligated for the principal amount of the loan exclusive of any financing charges, including interest.

To fully confirm its position as to the duties of the parties under the law, regulation and existing facts on May 13, 1976, counsel for the petitioners delivered an additional letter to the president of the lending bank which letter is shown in full in the opinion of the Supreme Court of Arkansas, Appendix "A", pages 26 and 27, parts of which are as follows:

> "I am writing this letter to confirm my previous discussions with you and Mr. Batchelor. On May 3, 1976, I advised you that Jerald V. Nietert and C. L. Goodwin were electing to rescind that certain transaction with the Citizens Bank and Trust Company on June 5, 1974.
>
> "By this letter, I hope to clarify our position. As noted in my previous letter, my clients are obligated to pay the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974. However, since this will necessitate my clients obtaining a loan elsewhere, they are willing to pay interest at the rate reflected in the original note from May 3, 1976, until the aforesaid principal amount of the note is paid. Furthermore, I will assure you that if we can reach an agreed settlement, my clients will immediately make application to the Farmers Home

> Administration for the necessary funds to repay this principal amount due."

Throughout the trial it was readily admitted by the borrowers that immediately upon receipt of the above letters, the lender readily agreed to accept the principal after allowing credit for all payments previously made with no interest and no financing charges whatever and that it would allow the borrower such a time as was necessary to obtain a loan elsewhere and, as shown by the findings of the trial court and the opinion of the Supreme Court of Arkansas, the borrowers sought funds from at least five financial institutions, with which to repay the principal sum due the lender. All such applications were denied.

It is clear that petitioners have changed their posture with reference to the settlement offer which they made and which was accepted by the lender and are now insisting that they should not repay any principal due because the bank did not release the security interest within ten days after notice of rescission in accordance with the statute and regulation. It is also readily obvious that the borrowers did not request satisfaction or release of the security instruments for the reason that they had interpreted the statute and regulation to require them to repay to the lender the principal sum less payments previously made and they did not have the funds with which to do so. They were unable to obtain these funds from other lending institutions and upon this development, they seek to free the property from the lien of the bank leaving it without any protection whatsoever. A court of equity, be it state or federal, cannot close its eyes to such an invidious scheme disguised in the name of consumer protection which has its main objective to defeat the security interest of the creditor who has

cooperated with the debtor fully and even during the trial offered to withhold action in order to give the obligors additional time to secure funds to pay their debt.

Approximately six months after the above mentioned letters disclosing the election to rescind and offering to repay the principal were received by the lending institution and after it was disclosed that the obligors had failed in their attempts to obtain financing, suit was commenced in the lower court for foreclosure of the security instrument. The judgment was for the principal of the loan, less all payments previously made and exclusive of interest, closing cost or attorney's fee. Regardless of how the argument may be put by petitioners, the appeal is from this finding and judgment and this finding and judgment alone.

Our research has failed to disclose any litigation in the courts of the State of Arkansas with reference to this federal statute and regulation promulgated thereunder. All the litigation has arisen in the United States District Courts and in many of the early cases the District Courts apparently were unaware of the equitable power to condition rescission on tender of repayment by the debtor, but as early as August, 1974, in the case of *Palmer v. Wilson, et al*, 502 F.2d 860, (Ninth Circuit), the court recognized the equitable power and duty of courts to condition their decrees granting rescission upon tender of repayment. The following is a quotation from that case:

> "Although some district courts have conditioned rescission on tender of repayment by the debtor when both rescission and damages were sought (e.g., Ljepya v. M. L. S. C. Properties (N.D. Cal. 1973), 353 F. Supp. 866), the court below apparently was unaware that it had the equitable power to condition its decree. Accordingly, we vacate the judgment and remand the case for consideration of the propriety of conditioning the grant of rescission on repayment of the Palmers. Upon remand the district court may decide to invite submission of additional affidavits or may hold an evidentiary hearing on this point. It may also require the defendants to submit a proposed plan for repayment that is consistent both with the defendants' desire to recover the amount of principal loaned to the Palmers and with the Palmers' current financial situation."

In the *Palmer* case one of the judges in concurring stated:

> "I concur with Judge Hufstedler but go farther. I believe that a court fashioning a decree in this type of case under the Truth In Lending Act must do equity and cannot ignore the plaintiffs' unpaid obligation for the principal sum of $9,300.00. Section 1635(b), Title 15, United States Code. If a rescission is demanded and effectuated without litigation, this Section requires the obligor to return the property or its reasonable value to the creditor. This, together with the Act's failure to void the principal obligation along with the security, is, for me, clear indication of Congressional intent that a complete windfall to the victim was not intended."

It has always been the position of the respondent, the lending institution, that the court had the right to condition the granting of rescission on obligors' own proposition, that is, that they tender and pay the original amount of the loan less all payments made to the time of the notice of rescission. Ordinarily, when there has been no offer to refund the

principal as here, the propriety of such a conditional decree of rescission depends upon the equities present in that particular case. Here, it appears, that all of the equities are with the respondent, the lender. There was never any attempt to sell the petitioners anything whatever. The petitioners, the obligors, were already indebted to the lending institution on the date of the loan complained of in the sum of $77,729.87, with a mortgage therefor on the very same land, and Goodwin and Nietert approached the bank for an additional sum of $30,000.00 with which to buy chickens. Thereupon at their request, the mortgage, note, and security agreements were rewritten to include the additional $30,000.00 for chickens which had already been procured for them by the Farmers Coop of Arkansas and Oklahoma. There was no question that this existing mortgage on the land was legal, no question of the balance due thereon and the entire transaction was a favor from the bank to the mortgagors in order that they may obtain the additional $30,000.00 to better use their land and equipment. According to all the evidence, there was no financing charge whatever except for interest. It is distinguished from many of the published cases under the Truth In Lending Act and Regulation Z in that there was no finders fee, no points, no insurance, credit life or otherwise, no abstracting costs, no attorneys fees — in fact, nothing whatever except the usual and ordinary interest rate with which the parties were entirely familiar, and same was a matter of common knowledge at the time they requested the mortgagee to rewrite the mortgage to include the additional $30,000.00, and it was fully shown by the disclosure statement, by the note itself, the mortgage and all other documents which evidenced the transaction. Even had there been finance charges which were not properly disclosed, under the hold-

ing in the *Palmer* case, *supra,* the court had the equitable power as well as the duty to condition the grant of rescission on payment of the principal. This was especially true under the circumstances here existing as the very notice of their election to rescind contained the unequivocal statement that it was their duty to repay the principal indebtedness less all payments previously paid and there was no request or suggestion that any security instrument be released or satisfied of record.

In the case of *LaGrone v. Johnson, et al* (April 21, 1976), 534 F.2d 1360, (Ninth Circuit), *LaGrone* owned a duplex in which she resided and which was subject to first and second deeds of trust. She procured a loan to prevent foreclosure on the second deed of trust from the Johnsons and executed security interest therein. After making a further and additional advancement of $5,000.00 to prevent foreclosure of the first deed of trust, and to preserve their security interest, and upon LaGrone again defaulting, the Johnsons eventually initiated foreclosure proceedings on their loan. A sale of her land was set but Mrs. LaGrone prevented the sale by filing an action for rescission, penalties, attorneys fees and other relief under the Truth In Lending Act in the United States District Court for the Northern District of California. The District Court held that Mrs. LaGrone was entitled to rescission with the judgment voiding the Johnsons' security interest in the duplex, finding that the Johnsons were entitled to recover $11,008.70 from Mrs. LaGrone but the District Court did not condition cancellation of the Johnsons' security interest on payment of the amount owed them by Mrs. LaGrone, and they were reduced to unsecured creditors. Among the issues presented to the Court of Appeals was whether the District Court should have conditioned rescission upon return by

Mrs. LaGrone of the monies advanced by the Johnsons. The court held that rescission should be conditioned on repayment in the following language:

> "We conclude, however, that the district court erred in not conditioning rescission on the tender of the net amounts advanced by the Johnsons. The discretion of the court to impose this condition is settled. Palmer v. Wilson, supra, 502 F.2d at 862; Ljepya v. M. L. S. C. Properties, Inc., supra, 511 F.2d at 944. We reject appellee's argument that this option is available only when both rescission and damages are at issue. The complaint in this case sought both remedies, but the civil penalty was barred by a one-year statute of limitations. Mrs. LaGrone should not be permitted to attain a preferred position with respect to rescission by waiting until the statute of limitations has run on the civil penalty. More important, it would be arbitrary to apply equitable principals to ameliorate unduly harsh penalties only if damages are sought. In this case the violations of the Act were not egregious and the equities heavily favor the creditors. Rescission therefor should have been conditioned on a tender by Mrs. LaGrone of the $11,008.70 advanced by the Johnsons."

Not only are all the equities with these respondents, the petitioners were the very first to recognize that they were obligated to return the original principal amount of the loan advanced after having received full credits for all payments made thereon, they were willing to pay interest at the rate reflected in the original note from May 3, 1976, until said principal amount had been paid. Upon their failure to secure funds to repay this money advanced, in desperation they seek to invoke the statutory scheme by

endeavoring to free their assets of the creditor's lien and leave it without any protection whatsoever. It was this action by the obligors which the trial court and Supreme court could not and would not condone.

Petitioners cite and rely upon the case of *Sosa v. Fite*, 498 F.2d 114 (August 1, 1974), (Fifth Circuit), in support of their present position that for the reason the respondents did not satisfy and release the mortgage of record within ten days from the date of the election to rescind, that they are entitled to retain the entire principal of the loan without any further obligation. A comparison of the facts and equalities in the *Sosa* case with the facts and equities in the case at bar is enlightening. In the *Sosa* case, a home improvements contractor of dubious repute entered into a contract with Mrs. Sosa to provide and install aluminum siding on her house. Included in the various documents, none of which Mrs. Sosa could grasp as she was unversed in the English language, was an instrument creating a deed of trust in favor of Tropical, a financial company which was a party to the action, to secure Sosa's payment of the total sales price. According to the opinion in that case, Sosa faithfully remitted monthly payments to Tropical over a considerable period of time, until her disenchantment with Fite's shoddy craftsmanship finally culminated in her refusal to make further payments. There was a foreclosure under the trust deed, the property was sold to a third party and it was at this point that Sosa invoked her right of rescission by an action in the United States District Court for the Southern District of Texas. Included in Sosa's notice of rescission was an express offer to return the aluminum siding and she did in fact make a tender. The following quotation is from the *Sosa* case:

"Our disposition of this case is not altered by the recent decision in Ljepya v. M. L. S. C. Properties, (N.D. Cal. 1973), 353 F. Supp. 866. In that case, the court permitted a borrower to rescind a tainted loan transaction violative of Truth-In-Lending on condition of repaying the principal, without interest, to the creditor within ten days of judgment. There is no indication in that case that the borrowers had ever attempted to return the proceeds of the loan, but instead the debtors were seeking simply to extricate themselves from the unwanted transaction. In that situation, it would have been consonant with the statute only for the debtors to remit to the creditor the loan proceeds in order to rescind the agreement, inasmuch as Section 1635(b) is clearly designed to restore the parties as much as possible to the status quo ante. But in the case sub judice, Sosa's express offer of restoration fell on deaf ears, thereby rendering applicable, upon the creditor's failure to comply with Section 1635(b), the plain directive of the statute: 'If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.' "

The *Sosa* case fails to support the petitioners in any position or any argument but in fact the same in every particular supports the position of respondent.

In the case of *Powers v. Sims and Levin,* 542 F.2d 1216, (October 1, 1976), (Fourth Circuit), Powers desiring to effect improvements to their home at an estimated cost of $1,250.00, negotiated a loan from defendant for $5,000.00. The extra money was needed to repay a previous loan to another lender of $2,758.13, delinquent fire insurance

premiums, real estate taxes, and other debts or charges, a total to be disbursed in satisfaction of outstanding debts of $3,303.85. Powers elected to rescind for the reason that proper disclosure had not been made. Later Mr. Powers in an additional letter offered to return the property constituting the impovements but contended that they were not required to reimburse defendant for the amount it had spent to discharge the earlier indebtedness. The District Court as well as the Court of Appeals held that proper notice of right of rescission was not given. Under these facts the Appeals Court held that the debtors committed an anticipatory breach of contract and the creditor was no longer obligated to cancel its security interest. The following quotations are from the opinion of Chief Judge Haynsworth in that case:

"What the debtors accomplished was not a rescission under the statute. In the face of such an anticipatory breach, the creditor was entitled to retain both the payment and its security interest."

Surely under the facts in the case at bar the lender had the right to retain its security interest when the borrowers stated that they were obligated to pay the principal, no request was made for release and there was no controversy between the parties.

In *Powers v. Sims and Levin, supra,* the Court further held that that rescission is an equitable doctrine, and there is nothing in the statutory provision of the right of rescission or in the procedural steps outlined in Section 1635(b) which limit the power of a court of equity to circumscribe the right and to avoid the perpetration of stark inequity.

Surely the Congress in enacting the statute did not intend to require a lender to relinquish interest when it

knows that the lender does not intend and is not prepared to tender restitution. Also surely it did not intend that a lender release its security interest when the borrowers, through their counsel, were stating that they were obligated to repay the principal and if this was agreeable they would immediately make application for loan of funds to make such payment. They were not suggesting that there be a release until they obtained the funds and were in position to pay same.

Not only is the position of the respondent supported by all of the equities and the authorities, its position now is the same position which was adopted by the petitioners at the time of the decision to rescind and at the time of the notice of rescission. We have heretofore quoted from their letter giving notice of their election to rescind dated May 3, 1976, in which they stated that they were obligated to return the original principal amount of the loan advanced after having received full credit for all payments made thereon and we have also pointed out that they confirmed and clarified the letter of May 3, 1976, with an additional letter of May 13, 1976. These letters are shown fully in the Appendix of Petitioners' Brief in Support of their Petition for Writ of Certiorari.

In support of their present position that they are entitled to retain the entire proceeds of the loan and pay nothing whatever therefor, petitioners cite, in addition to the *Sosa* case, *supra,* the District Court cases of *Burley v. Bastrop Loan Company, Inc.,* 407 F. Supp. 773 (1976), and the case of *Gerasta v. Hibernia National Bank,* 411 F. Supp. 176 (1976). We see nothing about either of these district court cases which support the present position of the petitioners.

Petitioners' argument that the Supreme Court of Arkansas erred in failing to assess attorneys fees is likewise untenable. There is no question that the statute provides that in the case of any successful action to enforce compliance with the Truth-In-Lending Statute and Regulation Z, the costs of the action, together with a reasonable attorney's fee as determined by the court may be awarded. Petitioners would make it appear that there has been an action by them to enforce compliance with the requirements imposed under the Act and regulation. This is not true. No such suit was commenced and none was required as will appear from the letters from appellants counsel dated May 3rd and May 13, 1976, as heretofore referred to, in which there was no request or demand for action on the part of the lender except for forebearance while they made application for a loan for the necessary funds to repay the principal amount due; there was forebearance from the date of these letters until November 22, 1976, when this suit was commenced to foreclose the mortgage and security interest, and thereafter until September 28, 1977, when the cause was tried. Throughout all this time, the lender was ready, willing and able to completely release the mortgage and security instruments upon payment of the principal amount of the original loan less all payments made thereon as had been proposed by the obligors at the time of their election to rescind.

Not only has there been a failure to bring an action to compel compliance as contemplated by the statute and regulation, there was a complete failure to allege entitlement to or claim attorneys fees in any pleading filed in the cause until a counterclaim was filed on August 11, 1977, which was filed without permission of the court and out of

time approximately eleven months after the suit was originally filed. Although the original answer filed in behalf of petitioners, defendants, on February 9, 1977, was filed out of time so far as the record discloses, the respondent has heretofore admitted that there was an order of the court allowing an answer in behalf of defendants and which was granted by the court in response to their petition for authorization to file an answer, which appears in the transcript from the trial court. It appears that the order ganting this petition was inadvertently omitted from the transcript. There certainly was no authorization for pleadings filed by the defendants, petitioners, thereafter and no such authorization was sought.

Petitioners cite, quote verbatim and rely upon Title 15, U.S.C.A. Section 1640(a)(3) for their entitlement to a reasonable attorneys fee as determined by the court. Part of this same statute which they do not cite and quote is Title 15, U.S.C.A. Section 1640(3)(e) which is as follows:

> "Any action under this section may be brought in any United States District Court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

No such action was brought within one year; no such action has been brought to this date. The most that can be said is that on August 11, 1977, in a counterclaim filed out of time the defendants, petitioners, prayed for the cost of this action together with a reasonable attorney's fee as determined by the court. At that time the action for any civil penalty, including attorney's fee, was barred by the section of the statute upon which petitioners now rely.

Respondent would readily concede that in an action

commenced in the proper court for the purpose of rescinding a transaction which was necessary to effect the rescission, begun within the time provided by the statute, there would be liability for a civil penalty, including reasonable attorney's fees to be determined by the court, and then only when the court found that the equities were in favor of the plaintiff prosecuting such an action.

In the case at bar there was never any reason for commencing an action to enforce rescission. There has always been the willingness upon the part of respondent to accept the principal indebtedness less all payments previously made, thereby forfeiting all the interest or financing charges, and the entire failure to complete the rescission has been petitioners' failure to obtain the funds to and pay the indebtedness as proposed in their letters of May 3rd and May 13, 1976.

In the *LaGrone v. Johnson* case, cited *supra*, the plaintiffs' counsel conceded that civil damages were barred by the one-year statute of limitations, 15 U.S.C.A. Section 1640(e), and the Court there held a civil penalty, including an attorney's fee, was barred by the one-year statute of limitations.

Petitioners, in support of their contention that the Arkansas courts should have allowed attorneys fee, cite and rely upon the same district court cases cited in support of their contention that they are entitled to a windfall of $107,729.87, the amount of the original note and mortgage signed by them, and they argue that these cases support them in both contentions. We see nothing about the District Court opinions in these cases which support respondents in either position taken by them.

CONCLUSION

The purpose of the Truth-In-Lending Act and Regulation Z thereunder was to assure that every customer who was in need of consumer credit was given meaningful information with respect to the cost of that credit, which, in most cases, must be expressed as an annual percentage rate computed on the unpaid balance of the amount financed.

In this case, as has been pointed out, the petitioners, Goodwin, were already indebted to respondent on the date of the loan in the sum of $77,729.87, and for which a mortgage then existed on the very same land, the Goodwins' home and farm. Goodwin and Nietert, approached the bank, respondent, for an additional sum of $30,000.00 with which to buy chickens, and the mortgage, note and security agreements were rewritten to include Mr. and Mrs. Nietert as joint obligors although they had no record title or ownership whatever, and to include the additional $30,000.00 for the chickens which had already been procured for them by the Farmers Coop of Arkansas and Oklahoma from Ken Ballew Hatcheries.

For some reason the officer of the bank who prepared the documents failed to furnish notice of the right of rescission to the two ladies involved or else failed to procure their written acknowledgment thereof. For this failure or omission and this alone, respondent has admitted and the court has found that the right of rescission exists. There is no material dispute as to the facts and the law is well established — the respondent has forfeited all financing charges to the date of the election to rescind, in this instance interest only, and it is the duty of obligors, petitioners, to refund the principal as they have heretofore recognized and admitted.

The judgment is in full compliance with the statute and regulation, especially considering the fact that the manner of effecting rescission was chosen by petitioners and agreed to by respondent, all the equities are with respondent, and there appears to be no special or important reason for the proposed review and the writ of certiorari should be denied.

Respectfully submitted,

FINES F. BATCHELOR, JR.
411 Main (P.O. Drawer L)
Van Buren, Arkansas 72956

Attorney for Respondent